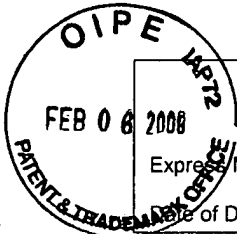


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BRINKS  
HOFER  
GILSON  
& LIONE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Appln. of: Richlen, et al.  
Appln. No.: 10/032,701  
Filed: December 28, 2001  
For: ABSORBENT GARMENT HAVING A WEAKENED REGION

Examiner: Reichle, Karin  
Art Unit: 3761

Attorney Docket No: 659/920  
K-C Ref. No: 17,595

Mail Stop Appeal Brief  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

TRANSMITTAL

Sir:

Attached is/are:

- ☒ Transmittal Letter (in duplicate); Appellants' Brief
- ☒ Return Receipt Postcard

Fee calculation:

- ☐ No additional fee is required.
- ☐ Small Entity.
- ☐ An extension fee in an amount of \$ \_\_\_\_\_ for a \_\_\_\_\_-month extension of time under 37 CFR § 1.136(a).
- ☒ A petition or processing fee in an amount of \$500.00 under 37 CFR § 41.20(b)(2).
- ☐ An additional filing fee has been calculated as shown below:

					Small Entity			Not a Small Entity	
	Claims Remaining After Amendment		Highest No. Previously Paid For	Present Extra	Rate	Add'l Fee	or	Rate	Add'l Fee
Total		Minus			x \$25=			x \$50=	
Indep.		Minus			x 100=			x \$200=	
First Presentation of Multiple Dep. Claim					+ \$180=			+ \$360=	
					Total	\$		Total	\$

Fee payment:

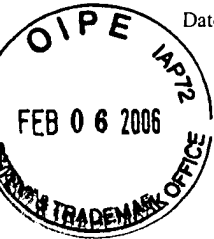
- ☒ A check in the amount of \$500.00 is enclosed.
- ☐ Please charge Deposit Account No. 23-1925 in the amount of \$ \_\_\_\_\_. A copy of this Transmittal is enclosed for this purpose.
- ☒ The Director is hereby authorized to charge payment of any additional filing fees required under 37 CFR § 1.16 and any patent application processing fees under 37 CFR § 1.17 associated with this paper (including any extension fee required to ensure that this paper is timely filed), or to credit any overpayment, to Deposit Account No. 23-1925.

Respectfully submitted,

2/6/06  
Date

Andrew D. Stover (Reg. No. 38,629)

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Date of Deposit: February 6, 2006

**BRINKS  
HOFER  
GILSON  
& LIONE**

Our Case No. 659/920  
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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Filing Date: December 28, 2001

For: **ABSORBENT GARMENT HAVING  
A WEAKENED REGION**

Examiner: Reichle, Karin

Group Art Unit No.: 3761

**APPELLANTS' BRIEF**

MS APPEAL BRIEF - PATENTS  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

This is an appeal from the Final Rejection dated October 31, 2005 of Claims 11-20,  
31-40, 42 and 44-48.

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## **(1) REAL PARTY IN INTEREST**

The inventors assigned their interests in the invention to Kimberly-Clark Worldwide, Inc. The real party in interest is Kimberly-Clark Corporation, which is the corporate parent of Kimberly-Clark Worldwide, Inc.

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### **(3) RELATED APPEALS AND INTERFERENCES**

There are no known appeals or interferences that will directly affect or be directly affected by or have a bearing on this appeal.

### **(4) STATUS OF CLAIMS**

Claims 11-20, 31-40, 42 and 44-48 are pending in the above-referenced application. Claims 1-10, 21-30, 41 and 43 were previously cancelled. Claims 11-20, 31-40, 42 and 44-48 (Appendix A) have been rejected.

### **(5) STATUS OF AMENDMENTS**

The rejected claims (Appendix A) are in the form as referred to in the Final Rejection of October 31, 2005.

### **(6) SUMMARY OF CLAIMED SUBJECT MATTER**

In general, the present invention relates to an improved refastenable absorbent garment, such as infant diapers, training pants and adult incontinence garments, and a method for the use thereof (Specification at page 1, line 25 to page 2, line 29). Absorbent garments are typically configured as pant-type, pull-on garments, or as refastenable diaper-type products that are drawn up between the legs and fastened about the waist (Specification at page 1, lines 5-8). Conventional pant-type garments typically do not include a refastenable mechanism that allows the garment to be easily removed after use or to be adjusted during use (Specification at page 1, lines 11-12).

On the other hand, diaper-type products, which can be configured with fastening systems that allow the user to detach and reattach various fasteners so as to provide a refastenable absorbent garment, often are not configured with various elastic elements, for

example around the waist, and may not conform well to the body of the user and/or may provide a bulky appearance beneath the user's garments (Specification at page 1, lines 13-18). Moreover, such garments are typically produced as an "open" product, which is open at the sides and which cannot be pulled on like a pant-type garment (Specification at page 1, lines 18-19). Some consumers prefer a pull-on type garment, since the garment is applied to the user like conventional underwear. Therefore, there remains a need for an improved absorbent garment, and in particular a pant-type garment, that is refastenable and provides a snug fit with a non-bulky appearance (Specification at 1, lines 21-23).

The presently claimed absorbent garment provides a simple and convenient way to convert a pant-type garment into an open product by providing a line of weakness that has sufficiently low tear strengths that allow the user to break the garment along the line of weakness without undue effort (Specification at page 2, lines 15-17). This can be important, for example, where the user desires to remove the garment without removing all of their clothing. For example, the user can break the garment fitted around their waist along the line of weakness, remove the garment, break the line of weakness on a new garment, and apply the new garment without removing their clothes (Specification at page 2, lines 20-24). The relatively low tear forces required to break the garment make it particularly well suited for those with weak grips or other infirmities (Specification at page 2, lines 23-24).

Importantly, at the same time, the fastener members 42 help retain the integrity of the body panel 4 across the line of weakness 37, whether broken or intact, during use and during the manufacture of the garment (Specification at page 2, lines 24-26; page 11, lines 5-15; page 15, line 4 to page 16, line 11; page 24, line 25 to page 25, line 8; FIG. 15). The garment, with its line of weakness in tact, can be pulled on to the user like underwear. For

example, the body panel can be provided with a line of weakness 37, with the fastener member 42 then being applied over the line of weakness (*id.*). The line of weakness 37 can then be further weakened to the claimed tear strength without jeopardizing the integrity of the body panel web during the manufacture process (Specification at page 16, lines 8-12; FIGS. 1 and 12-14).

With reference to independent claim 11, the absorbent garment includes a body panel 4 or 6 having a line of weakness 37 extending across at least a portion thereof. The body panel has a tear strength of less than about 5 lbf along the line of weakness (Specification at page 9, lines 5-11; FIGS. 15 and 16). Similarly, with reference to independent claim 31, a method of using the absorbent garment includes providing an absorbent garment having a body panel with a line of weakness extending across at least a portion thereof, and applying a tear force to the body panel along the line of weakness, wherein the tear force is less than about 5 lbf (*id.*; page 27, lines 1-14). The method further includes breaking the body panel along the line of weakness in response to the application of the tear force (*id.*). Claims 16 and 35 further recite fastener members bridging the line of weakness.

With reference to dependent claim 14, the body panel also has a tensile strength of less than about 6.62 lbf across the line of weakness (Specification at page 8, line 27 to page 9, line 2). With reference to claim 45, the body panel has a tensile strength of less than about 5 lbf across the line of weakness (*id.*).

With reference to independent claim 42, the body panel having a tear strength of less than about 5 lbf along a line of weakness is configured as a front body panel extending continuously between and defining opposite, laterally spaced side edges joined to opposite, laterally spaced side edges of a rear body panel at a pair of side seams (Specification at page

24, line 25 to page 25, line 5). The line of weakness is formed in the front body panel between the side edges (*id.*). The front body panel 4 has a first terminal crotch edge 16 formed at least at a midpoint between the side edges 24 of the front body panel (Specification at page 18, lines 10-19; FIGS. 15 and 16). The rear body panel 6 has a second terminal crotch edge 14 formed at least at a midpoint between the side edges 28 of the rear body panel (*id.*). The first and second terminal crotch edges 16, 14 are longitudinally spaced apart and define a longitudinally extending gap therebetween at the midpoints (FIG. 15). An absorbent composite 50 bridges the longitudinally extending gap at the midpoints between the side edges of the front and rear body panels 4, 6 and overlies the midpoints, wherein the absorbent composite is connected to the front and rear body panels (Specification at page 35, lines 18-22; FIG. 15).

With reference to independent claim 44, the method of using an absorbent garment includes providing an absorbent garment comprising a body panel having a line of weakness extending across at least a portion thereof and applying a tear force to the body panel along the line of weakness, wherein the tear force is less than about 5 lbf. The method further includes breaking the body panel along the line of weakness. The body panel is configured as a front body panel as set forth above with respect to claim 42.

#### **(7) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The Examiner rejected independent claims 11-20, 31-40 and 45-46 under 35 USC 102(b) and 103(a) being anticipated by or made obvious over UK patent application GB 2 267 024 A to Igaue. The Examiner rejected claims 42, 44 and 47-48 under 35 USC 103(a) as being obvious over Igaue in view of PCT Publication No. WO 00/47142 to Van Gompel.

## **(8) ARGUMENT**

### **1. Claims 11-20, 31-40, 45 and 46 Are Not Anticipated or Made Obvious Over UK Patent Application GB 2 267 024 A to Igaue<sup>1</sup>**

The Examiner has rejected claims 11-20, 31-40, 45 and 46 over Igaue on the basis of three different arguments, namely that: (1) Igaue inherently anticipates the claimed subject matter (Office Action at 3), (2) Igaue makes obvious the claimed subject matter (Office Action at 4) and (3) Igaue makes obvious the claimed subject matter, which are asserted to be product by process claims (Office Action at 4). Applicants respectfully disagree on all counts.

#### **A. Igaue Does not Inherently Anticipate the Claimed Subject Matter**

It is black letter law that “[t]he fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic” (MPEP 2112, citing *In re Rijckaert*, 9 F.3d 1531, 1534, 28 USPQ2d 1944, 1957 (Fed. Cir. 1993)). “Inherency may not be established be probabilities or possibilities” (MPEP 2112, citing *In re Roberston*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999)).

In the present case, as admitted by the Examiner, Igaue fails to disclose or teach the claimed tear and tensile strengths (Office Action at 3, para. 4). The Examiner, however, has failed to specify how the materials and perforations of Igaue are “identical” to those of the present application (MPEP 2112). It is clear that merely providing a perforation or line of weakness in a panel does not *necessarily* result in the panel having the claimed tear strength. Rather, the tear strength can depend on many parameters, including for example and without

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<sup>1</sup> Applicants hereby argue the patentability of rejected claims 11-20, 31-40, 45 and 46 together. In addition, Applicants have separately argued the patentability of claims 14 and 45 as set forth below, and to the extent necessary, claims 16 and 35 (see footnote 3).



limitation the type of material and the configuration of the line of weakness. Indeed, Applicants' own data, showing a divergence of tear strengths depending on the perforation characteristic, nullifies any argument of inherency (Specification at 15, Table I and at 37, Table II).

Applicants further agree with the Examiner that the claims do not recite a specific testing protocol (Office Action at 3), but Applicants fail to see the bearing of that on inherency. The body panels of Igaue either necessarily have the claimed properties, or they do not. In this case, the Examiner has failed to carry her burden in showing that the properties necessarily occur, and Applicants have provided evidence that they do not. Accordingly, the Examiner's rejection must be dismissed.

#### **B. Igaue Does not Make Obvious the Claimed Subject Matter**

Igaue also does not disclose or suggest the claimed tear strengths. In particular, Igaue is completely silent with respect to *tear* strengths across a line of weakness, or for that matter *any* properties across a line of weakness. Instead, Igaue discloses various *bond* strengths of *bond lines 8*, which are not lines of weakness, but rather are positioned adjacent cutting lines 9b (Igaue at 5-6).<sup>2</sup> As such, Igaue is silent as to *any* properties (tensile, tear, or otherwise) across the cutting lines 9b, applied by the Examiner as the lines of weakness.

Moreover, Igaue does not teach or suggest, and the Examiner has not provided any evidence of, a correlation between the bond strength of a bond line bonding two webs and

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<sup>2</sup> As previously noted in Applicants' Amendment filed January 9, 2004, the Corrected Amendment filed February 11, 2005 and Amendment filed August 18, 2005, Igaue does not disclose and in fact teaches away from *bond* strengths less than about 6.62 lbf (see, e.g., January 9, 2004 Amendment at 14).

the tensile strength across a web (regardless of whether it has a line of weakness), let alone a further correlation between the tensile strength of the web and the tear strength of the web. As such, any reference to *bond* strengths of a bond line in Igaue is at least *twice* removed from any disclosure or teaching about *tear* strengths of a web along a line of weakness. Since Igaue fails to disclose or suggest all of the elements of the claims, the rejection must be withdrawn for this reason alone (MPEP 2143 (Prima facie case of obviousness requires showing of all of elements in the prior art)).

Moreover, with respect to the claimed *tear* strengths, Applicants have discovered that the claimed ranges achieve unexpected results, namely that the web can be weakened to a point where a user can easily break the panel along a line of weakness. At the same time, however, and as now twice ignored by the Examiner in her Office Actions, the web of Applicants' invention can still be processed on a manufacturing line with minimal risk of breaking the web by virtue of using fastener member across the line of weakness or by virtue of the configuration of the manufacturing line (Specification at 8, line 14 to 9, line 12).

In contrast, there is no suggestion that the *claimed* tear/tensile values would be desirable in the construction of Igaue, since it would be difficult to process the garment due to line breaks and the like associated with such tear/tensile values. For example, Igaue does not provide any disclosure of applying a fastener member across a line of weakness immediately after the formation thereof, or further weakening a line of weakness downstream in the manufacturing process. It is important to note that claims do not have to

recite the use of fastener members crossing the line of weakness when making this assertion.<sup>3</sup>

Rather, the argument is merely that *Igaue* does not disclose or suggest a line of weakness having the *claimed* properties by virtue of the diaper construction in *Igaue* when *Igaue* is viewed in its entirety without the benefit of hindsight analysis.

### **C. The Claims are Not Product By Process Claims**

The Examiner has misconstrued the claims as being product by process claims. The claimed tear values are *properties* of the body panel, not a process for making the panel. Accordingly, the Examiner's reliance on MPEP 2113 is misplaced (Office Action at 4). Moreover, the Examiner previously noted that the claims did *not* specify any testing protocol (Office Action at 3). Accordingly, it is contradictory later to assert that the claims are limited by the "processing" of testing, such that the claim can be defined as product-by-process claim, all the while ignoring that testing has nothing to do with how the product is made. Indeed, in the several Office Actions raising this issue, the Examiner has not pointed to *any authority* for her position that a recited property material, which may be ascertained by testing (not recited), can or should be construed as a product-by-process claim. In contrast, the patent system is replete with patents reciting properties without an accompanying testing protocol.

Moreover, as just explained, the present claims are not even directed to a process for testing, but rather merely recite properties of a material. Those properties can be ascertained using the testing protocol disclosed in the specification, but the Examiner cannot and should

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<sup>3</sup> To the extent that the Board finds the recitation of fastener members bridging the line of weakness to have some relevance to this issue, they are respectfully referred to claims 16 and 35, which should then be considered on their own merits.

not read into the claims such a protocol to advance her argument of the claims being product-by-process. Indeed, Applicants note that the Examiner has not, in the many Office Actions received in this case, ever asserted that the claims are indefinite or unclear.

For at least these reasons, Igaue does not disclose or suggest all of the limitations of claims 11-20, 31-40, 45 or 46, and the Examiner's rejections should therefore be withdrawn.

**2. Claims 14 and 45 Are Not Anticipated or Made Obvious Over UK Patent Application GB 2 267 024 A to Igaue**

Although claims 14 and 45 are patentable for the reasons set forth above, Applicants make the following additional comments. In particular, the Examiner previously asserted that Igaue teaches that the *tensile* strength of the cutting lines 9b have a tensile strength of *at least* that of the bonding lines 8, or that it would be obvious to make the tensile strength of the cutting lines 9b *at least the same as* that of the bond lines 8 ( October 8, 2003 Office Action at 6), asserting that the integrity of the garment is maintained at least equally across the bond lines 8 and cutting lines 9b during normal use. Igaue discloses that the bond lines 8 have a bond strength of "1000 g/inch or higher" (Igaue at page 6), which converts to 6.62 lbf (taking into account a 3 inch sample as used in the testing protocol – see Specification at page 25). According to the Examiner, therefore, Igaue requires that the cutting line have a bond strength of *greater than* 6.62 lbf (*id.*).

However, even if the *tensile strength* (not the tear strength) of a portion of a body panel is equated with bond strength, claims 14 and 45 disclose respectively that the body panel has a tensile strength of "less than about 6.62 lbf across said line of weakness" and

“less than about 5 lbf across said line of weakness.” Accordingly, claims 14 and 45 distinguish over Igaue for this additional reason.

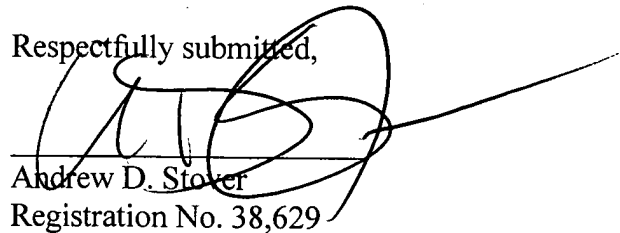
**3. Claims 42, 44, 47 and 48 are not Made Obvious Over UK Patent Application GB 2 267 024 A to Igaue in view of PCT Application WO 00/47152 to Van Gompel**

Independent claims 42 and 44 each recite a body panel having a “tear strength of less than about 5 lbf along [a] line of weakness.” Claims 42 and 44, and claims 47 and 48 depending therefrom, are therefore patentable over Igaue for all of the reasons set forth above with respect to claims 1 and 31. The Van Gompel reference does not supply any of the deficiencies of Igaue, and the Examiner has not cited Van Gompel as such. Accordingly, claims 42, 44, 47 and 48 should be allowed for all of the reasons set forth above with respect to claims 1 and 31.

**4. Conclusion**

The cited references do not provide a valid basis for an anticipation rejection or a *prima facie* obviousness rejection of the present claims. Accordingly, Appellants submit that the present invention is fully patentable over the cited references, and the Examiner’s rejections should be REVERSED.

Respectfully submitted,

  
\_\_\_\_\_  
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## APPENDIX A

The claims at issue in this appeal are as follows:

11. An absorbent garment comprising:  
a body panel having a line of weakness extending across at least a portion thereof, wherein said body panel has a tear strength of less than about 5 lbf along said line of weakness.
12. The absorbent garment of claim 11 wherein said tear strength of said body panel along said line of weakness is less than about 4 lbf.
13. The absorbent garment of claim 11 wherein said tear strength of said body panel along said line of weakness is less than about 3 lbf.
14. The absorbent garment of claim 11 wherein said body panel has a tensile strength of less than about 6.62 lbf across said line of weakness.
15. The absorbent garment of claim 11 wherein said line of weakness extends across an entire length of said body panel.
16. The absorbent garment of claim 11 further comprising a fastener member bridging said line of weakness, wherein said fastener member is fixedly secured to said body panel on one side of said line of weakness and is releasably engaged with said body panel on the other side of said line of weakness.
17. The absorbent garment of claim 11 wherein said line of weakness comprises a perforation.
18. The absorbent garment of claim 11 wherein said body panel comprises a nonwoven spunbond material.

19. The absorbent garment of claim 11 wherein said body panel comprises an elastomeric material.

20. The absorbent garment of claim 11 wherein said body panel comprises a front body panel joined to a rear body panel at a seam, wherein said line of weakness is formed in said front body panel.

31. A method of using an absorbent garment comprising:  
providing an absorbent garment comprising a body panel having a line of weakness extending across at least a portion thereof; and  
applying a tear force to said body panel along said line of weakness, wherein said tear force is less than about 5 lbf, and thereby breaking said body panel along said line of weakness.

32. The method of claim 31 wherein said applying said tear force comprises applying said tear force after said absorbent garment is fitted on a user.

33. The method of claim 31 wherein said applying said tear force comprises applying said tear force before said absorbent garment is fitted on a user.

34. The method of claim 31 wherein said line of weakness extends across an entire length of said body panel.

35. The method of claim 31 further comprising a fastener member bridging said line of weakness, wherein said fastener member is fixedly secured to said body panel on one side of said line of weakness and is releasably engaged with said body panel on the other side of said line of weakness, and further comprising disengaging said fastener member from said body panel on said other side of said line of weakness prior to said applying said tear force to

said body panel across said line of weakness and prior to said breaking said body panel at said line of weakness.

36. The method of claim 31 wherein said line of weakness comprises a perforation.

37. The method of claim 31 wherein said body panel comprises a front body panel joined to a rear body panel at a seam, wherein said line of weakness is formed in said front body panel.

38. The method of claim 31 wherein said tear force applied to said body panel along said line of weakness is less than about 4 lbf.

39. The method of claim 31 wherein said tear force applied to said body panel along said line of weakness is less than about 3 lbf.

40. The method of claim 31 further comprising applying a tensile force to said body panel across said line of weakness simultaneously with said applying said tear force, wherein said tensile force is less than about 6.62 lbf.

42. An absorbent garment comprising:

a body panel having a line of weakness extending across at least a portion thereof in a longitudinal direction, wherein said body panel has a tear strength of less than about 5 lbf along said line of weakness, wherein said body panel comprises a front body panel extending continuously between and defining opposite, laterally spaced side edges joined to opposite, laterally spaced side edges of a rear body panel at a pair of side seams, wherein said line of weakness is formed in said front body panel between said side edges of said front body panel, and wherein said front body panel has a first terminal crotch edge formed at least at a midpoint between said side edges of said front body panel and said rear body panel has a second terminal crotch edge formed at least at a midpoint between said side edges of said



rear body panel, wherein said first and second terminal crotch edges are longitudinally spaced apart and define a longitudinally extending gap therebetween at said midpoints between said side edges of said front and rear body panels, and further comprising an absorbent composite bridging said longitudinally extending gap at said midpoints between said side edges of said front and rear body panels and overlying said midpoints between said side edges of said front and rear body panels, and wherein said absorbent composite is connected to said front and rear body panels.

44. A method of using an absorbent garment comprising:

providing an absorbent garment comprising a body panel having a line of weakness extending across at least a portion thereof; and  
applying a tear force to said body panel along said line of weakness, wherein said tear force is less than about 5 lbf, and thereby breaking said body panel along said line of weakness;

wherein said body panel comprises a front body panel extending continuously between and defining opposite, laterally spaced side edges joined to opposite, laterally spaced side edges of a rear body panel at a pair of side seams, wherein said line of weakness is formed in said front body panel between said side edges of said front body panel, and wherein said front body panel has a first terminal crotch edge formed at least at a midpoint between said side edges of said front body panel and said rear body panel has a second terminal crotch edge formed at least at a midpoint between said side edges of said rear body panel, wherein said first and second terminal crotch edges are longitudinally spaced apart and define a longitudinally extending gap therebetween at said midpoints between said side edges of said front and rear body panels, and further comprising an absorbent composite bridging said longitudinally extending gap at said midpoints between said side edges of said front and rear body panels and overlying said midpoints between said side edges of said front and rear body panels, and wherein said absorbent composite is connected to said front and rear body panels.

45. The absorbent garment of claim 14 wherein said body panel has a tensile strength of less than about 5 lbf across said line of weakness.

46. The method of claim 40 wherein tensile force is less than about 5 lbf.

47. The absorbent garment of claim 42 wherein said crotch member comprises opposite, longitudinally spaced first and second terminal edges and said front and rear body panels comprise first and second terminal waist edges respectively, wherein said first and second terminal edges of said crotch member are longitudinally spaced from said first and second terminal waist edges of said front and rear body panels respectively.

48. The absorbent garment of claim 44 wherein said crotch member comprises opposite, longitudinally spaced first and second terminal edges and said front and rear body panels comprise first and second terminal waist edges respectively, wherein said first and second terminal edges of said crotch member are longitudinally spaced from said first and second terminal waist edges of said front and rear body panels respectively.

**APPENDIX B (EVIDENCE APPENDIX)**

NONE

**APPENDIX C (RELATED PROCEEDINGS APPENDIX)**

NONE